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IN THE

Supreme Court of the United States

October Term, 1989

No. _____

FRANK A. ROMEO, Petitioner

- against -

UNITED STATES OF AMERICA, Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether there was sufficient evidence to prove that Petitioner's attempts to communicate with witness Vincent Filipini were prohibited acts within the ambit of 18 USC Section 1512(b) (3) or that the evidence was sufficient to sustain guilt under 18 U.S.C. Section 371.

2. Whether the application of 18 USC Section 1512(b)(3) to Petitioner's case was an unconstitutional deprivation of Petitioner's right to due process pursuant to the Fifth Amendment.

3. Whether Petitioner's legal representation at trial constituted ineffective assistance of counsel, causing Petitioner to be substantially deprived of a fair trial.

4. Whether a witness' reference to the mafia and the trial Judge's failure to give a curative instruction concerning this reference was so prejudicial as to warrant reversal.

5. Whether the District Court erred in denying Petitioner's motion for a new trial based on a juror's voluntary admission to the Court that he had been coerced by another juror during deliberations.

6. Whether the District Court erred in its application of Sentencing Guideline Section 2J1.2.(b)(1).

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JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on March 22, 1990 (Docket No. 89-1278), affirming the conviction and sentence entered by the United States District Court for the Northern District of New York on June 7, 1989. The jurisdiction of this Court is invoked pursuant to and under Title 28, United States Code, Section 1254(1).

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Second Circuit was entered on March 22, 1990 (Docket No. 89-1278). The opinion is contained in the Appendix at page A1.

STATUTES INVOLVED -

The following statutes are relevant to this Petition for Writ of Certiorari:

1) 18 U.S.C. Section 371:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons to any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

2) 18 U.S.C. Section 1512(b)(3):

> (b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to —-
>
> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

3) 18 U.S.C. Section 3742 (a)(2)

> (a) Appeal by a defendant - A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence —
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines;

4) U.S.S.G. Section 2J1.2:

> **Obstruction of Justice**
>
> (a) Base Offense Level: 12
>
> (b) Specific Offense Characteristics
>
> (1) If the offense involved causing or threatening to cause physical injury to a person, or property damage, in order to obstruct the administration of justice, increase by 8 levels.
>
> (2) If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.

STATEMENT OF THE CASE

A. Procedural History

Petitioner, Frank Romeo, makes this Petition for Writ of Certiorari from the affirmance by the United States Court of Appeals for the Second Circuit of a judgment of conviction rendered in the United States District Court, Northern District of New York, on three counts of a five count indictment. The Indictment, named Petitioner and co-defendant Ralph Valenti, and charged four substantive counts of intimidating, with intent to delay, hinder or prevent, a federal witness from communicating information to an Internal Revenue Service ("IRS") agent in violation of 18 USC Section 1512(b)(3) and one count of conspiring to intimidate the witness in violation of 18 USC Section 371. Both Defendants were found guilty of Count I which charged a conspiracy to intimidate the witness. Petitioner was convicted of Count II, a substantive violation of Section 1512, and of Count IV, causing Valenti to commit a substantive offense. Petitioner and Valenti were acquitted of the two remaining substantive counts.

Petitioner moved after the conviction for Judgment of Acquittal Notwithstanding the Verdict, pursuant to Fed. R. Crim. P. 29(c) or in the alternative, for a New Trial pursuant to Fed. R. Crim. P. 33. These motions were denied. Petitioner was sentenced on May 31, 1989. Sentencing Guideline Section 2J1.2 set the base level for this offense at 12, with a range of ten to sixteen (10 - 16) months. The District Court accepted the Government's recommendation to apply Sentencing Guideline Section 2J1.2(b)(1), which enhanced the base offense level to twenty (20), with a range of thirty three to forty two (33 - 42) months. Petitioner was sentenced to serve thirty-five (35) months. Judgment and sentence were entered on June 1989. A motion was made to the Second Circuit for a Stay of the Sentence Pending the Appeal, pursuant to 18 USC Sections 3143(b) and 3585 and Rule 9(b) of the Federal Rules of Appellate Procedure. This motion was denied.

B. Factual Background

In the Fall of 1988, Diane Turner, Special Agent of the IRS, was conducting a criminal investigation of possible violations of Internal Revenue Service laws by Joseph and Ann DeBartolo. Turner testified that during the investigation she discovered documents which linked the DeBartolos and Petitioner to certain legitimate financial transactions, and she decided to explore this relationship.

During the course of her investigation, Agent Turner received an anonymous phone tip concerning Vincent Filipini, an employee of Petitioner's at the business known as Executive Car Company. Turner's investigation of Filipini mysteriously evolved into a working relationship which, eventually, led to the wearing of a wire by Filipini during a meeting with Petitioner. Filipini testified that Petitioner was concerned about his financial dealings with the DeBartolos and that he had construed certain actions of Petitioner's to be an effort to induce Filipini not to cooperate with Turner.

The government attempted to characterize these actions as an effort to harass Filipini in order to dissuade him from cooperation. The alleged harassment took various forms, including driving a vehicle in a manner to endanger Filipini, and sending co-Defendant Valenti to Filipini's home for the alleged purpose of threatening him.

On March 24, the jury came in and was polled. During the polling of the jury, juror number three (3) displayed great hesitancy and discomfort when it became his turn to agree to the verdict. Inexplicably, neither the Government, defense counsel or the District Court inquired into this display of uneasiness. Days later, juror number three arrived voluntarily at the chambers of United States District Court Judge, Hon. Con G. Cholakis. Juror number three told Judge Cholakis that he felt that juror number seven (7) had improperly influenced him into agreeing to a verdict which did not reflect his true beliefs. This incident was also one of the bases of Petitioner's post-conviction motions for an Acquittal Notwithstanding the Verdict and/or a New Trial, which were denied. Counsel further requested a hearing on the issue, which would require an examination of the jury to determine whether external pressures had been improperly exerted. This request was also denied.

POINT I

THE DISTRICT COURT ABUSED ITS DISCRETION IN ITS DENIAL OF PETITIONER'S MOTION FOR A DIRECTED VERDICT AND/OR A NEW TRIAL WHEN THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT PETITIONER HAD INTENDED TO HINDER, DELAY OR PREVENT FILIPINI FROM TESTIFYING

The standard for appellate review of an insufficiency claim is "whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt." *Jackson v. Virginia,* 443 US 307, 317 (1979); *United States v. Carson,* 702 F2d 351, 361 (2d Cir. 1983). The evidence must be viewed in the light most favorable to the government. *Glasser v. United States,* 315 US 60, 80 (1942); *Carson,* 702 F2d at 361.

Section 1512(b)(3) of the Victim and Witness Protection Act provides:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to — hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

This section does not prohibit all forms of witness tampering, but only tampering through the use of intimidation, physical force, or threat. *United States v. King,* 762 F2d 232, 237 (2d Cir. 1985). The gist of the offense is coercive conduct. *United States v. Lester,* 749 F2d 1288, 1293 (2d Cir. 1984). *See also,* S. Rep. No. 532, 97th Cong. 2d Sess. 17 (1982) *reprinted in* 1982 US Code Cong. and Ad. News 2515, 2523.

The scope of Section 1512(b)(3) was described by Congressman Peter Rodino:

> [T]he Senate amendment adds a new subsection describing a misdemeanor offense of intentionally harassing another person and thereby intentionally preventing any person from attending or testifying in an official proceeding. . . The Senate language will reach thinly-veiled threats that create justifiable apprehension in a victim or witness. *It does not reach mere annoyance, however, nor does it reach conduct, for example, that is not intended. . .to prevent the witness from testifying. . .*

128 Cong. Rec. H8649 (daily ed. Oct. 1, 1982) (emphasis added).

A review of the evidence will show that the acts attributed to Petitioner were not intended to coerce or threaten Filipini for any purpose, and certainly not for the purpose of preventing him from testifying to Diane Turner. Instead, the attempts by Petitioner to communicate with Filipini comprised a misguided effort on Petitioner's part to salvage a personal relationship in which he had been Filipini's financial victim. The evidence showed that Petitioner hired Filipini to work at his company, the Executive Motor Car Company, because of their personal friendship, allowed Filipini, a 20-year old boy, to hold himself out as a vice-president of his company, allowed this boy to issue Executive Motor Car Company checks, gave him a corporate American Express card, co-signed loans for him and loaned him several thousand dollars. The evidence also showed that Filipini was being investigated by the IRS for his purchase of two cars, each worth approximately $30,000, during the year Filipini worked for Petitioner and that Filipini had a history of fraudulent credit practices.[1]

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[1]At Petitioner's sentencing, AUSA Silver requested an upward enhancement of Petitioner's sentence level based on Filipini's vulnerability. Hon. Con. G. Cholakis denied this request and stated:

> THE COURT: I observed the victim in the courtroom, 20 years old that he was or 21 or whatever his age was in the courtroom. He seemed to be, to me, to be a street-wise young man; that he was *not quite as vulnerable as some other defendants* I've seen in this courtroom. I refuse to enhance. Anything else?

TR. 23, May 31, 1989.

The Government offered evidence of the following events to prove that Petitioner had intended to prevent Filipini from testifying:

1. Petitioner made threatening and harassing telephone calls, which were taped by Filipini, unbeknownst to Petitioner, and received into evidence;

2. Petitioner allegedly engaged in a car chase of Filipini, during which time Filipini had planted in the back seat a local police officer, who knew Filipini through his activity as a "snitch" for the local police department;

3. Petitioner allegedly made anonymous phone calls which were against Filipini's interest;

4. Petitioner conspired with Valenti to threaten Filipini.

Each of these allegations will be discussed separately in the approximate order in which they are alleged to have occurred, so that the paucity of the Government's proof can be demonstrated.

Government's exhibit 4C was a transcript of two tape recorded conversations which took place on November 3, 1988, between Filipini and Petitioner. Filipini placed the call, a fact which shows that this phone call was not part of any pattern of intimidation of Petitioner's. The first part of the conversation contains no references to the IRS investigation. Petitioner is pleading with Vince to speak to him and says:

Petitioner: Vince please. I'm telling you that's just all nonsense. All I wanted to do - all I said to you last night -that how you drove me crazy all night - Vince, I swear to God to you - may God strike me dead - I'm going to kill myself no matter what happens, but before I do I swear to God I'll take everybody with me. You know I'll do it.

Expletives deleted.

This portion of the tape is the portion which contains the alleged threat. This "threat" is the type of desperate hysterical argument made by many people in the heat of an argument and is not an act prohibited by Section 1512(b)(3).

Also, Petitioner discusses Filipini's tax problem with him:

Petitioner: But that's so dumb - that is so dumb - I mean a simple thing like I wanted to give you a 1099 at any figure you wanted and put up the money to pay the 1099. That wasn't a difficult problem.

If anything, it would have taken you out of a problem. I stole the 1099 for Christ's sake - I'm in enough trouble for just doing that - I took it out of the accountant's office. You know I'm not supposed to have one. . .

Further in this discussion, Petitioner says in reference to Diane Turner's investigation of himself:

> *I'm not asking you to, to, to get me off the hook on Diane Turner - I'll do it myself.* I told you I owe around $65,000 for one year - for taxes not that much but thats (sic) the total amount. *You know I'm not bothering you with those problems.*

(Emphasis added.)

Both of these statements demonstrate that Petitioner was concerned about Filipini's tax problems, and not his own. This exhibit also contains messages left for Filipini from Petitioner asking Filipini to call and complaining of being left waiting at pre-arranged meeting places.

This tape provides no evidence of an intent to prevent Filipini from giving evidence to Diane Turner. If anything, it depicts a person who is concerned about his friend's welfare, is trying to help him, and is confused by his friend's rebuffs.

That evening the alleged car chase occurred. The details of the chase were offered by City of Rensselaer Police Department Detective Wayne Peplowski, who was contacted by Filipini and his mother concerning the presence of Petitioner's car within sight of their home. Peplowski went to the Filipini residence and sneaked into the back seat of Filipini's car. Filipini's car pulled out onto the road and Petitioner's car followed. *Id.* Peplowski described a car chase between Petitioner and Filipini during which Petitioner was signalling to Filipini by flashing his lights, "tailgated" Filipini, and attempted to get him to stop his car. Peplowski testified that Filipini stopped and Petitioner said to him: "Vince I have to talk to you. If this continues like this somebody's gonna end up getting killed like this. I have to talk to you about this tax thing."

This is another so-called threat by Petitioner intended to prevent Filipini from giving evidence to Diane Turner. It is obvious that

Petitioner is merely remarking on their joint stupidity during this drive. However, it is also obvious that Petitioner's pursuit of Filipini was not criminal. Peplowski, an eyewitness to the chase, did not even issue a ticket to Petitioner for a traffic infraction. Nor did he issue a summons for the criminal violation of Harassment. New York Penal Law Section 240.25 (McKinney's 1980 & Supp. 1989). It is clear that this "car chase" is merely another example of Petitioner attempting to communicate with Filipini in order to re-establish their personal relationship. The car chase and the testimony surrounding it provide no evidence that Petitioner committed acts which fell within the scope of Section 1512(b)(3).

Another incident of intimidation asserted by the Government involves the circumstances of a visit by Co-Defendant Valenti to Filipini's house. This act is also innocuous. Filipini testified that Valenti came to his house on November 5 for the purpose of inducing him to call Petitioner. Filipini testified that there were two "large, black males"[2] in the car with Valenti who were "snickering about how they were going to go rape (his) girlfriend"[3]. Valenti's version of this event differed. Valenti testified that he had gone to see Filipini to ask him to call Petitioner and straighten out differences which they were having concerning Filipini's unauthorized use of the corporate credit card and the loans Petitioner had made to

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[2]Filipini testified as to the race of Valenti's passengers in response to a specific question by the prosecutor concerning this characteristic. The prosecutor's misguided and inexplicable emphasis on the race of these passengers was also displayed during his opening statement. Unfortunately, defense counsel did not object to these remarks or this testimony. However, the failure of the Trial Judge to admonish the prosecutor about these racial references was plain error and was asserted below as separate grounds for reversal pursuant to Fed. R. Crim. P. 52 (b).

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[3]This evidence was inadmissable against Romeo absent a determination by the trial court that the Government had demonstrated the existence of a conspiracy and that these were statements made in furtherance thereof. *United States v. Geaney*, 417 F2d 1116, 1119 (2d Cir. 1969), cert. denied 397 US 1028 (1970). The failure of petitioner's trial counsel to raise this issue, and its obvious prejudicial effect on the defense is discussed under the examination of Petitioner's ineffective assistance claim.

Filipini. As to the two men in his car, Valenti stated that these were two young boys who were hitchhiking. There is no evidence which can be adduced from either of these versions of this event which tends to prove Petitioner's guilt of prohibited acts within 1512(b)(3) because there was no evidence offered that this visit was made at Petitioner's behest.

The next event also concerned Valenti and was alleged to have occurred on November 7, 1988. This was a phone call from Valenti to Filipini, admitted as Government's exhibit 5C. This conversation consisted of Valenti urging Filipini to call Petitioner and Filipini assuring him that he would so do. There are no references in this telephone call to Diane Turner or the IRS. The jury agreed with this analysis of the facts and acquitted Valenti of Count V of the Indictment, which charged him with a substantive violation of 1512(b)(3).

Valenti's acquittal on Count V of the Indictment is inconsistent with Petitioner's conviction on Count IV of the Indictment, which charges Petitioner with causing Valenti to commit the acts alleged in Count V.

It is generally settled law that inconsistent jury verdicts do not ordinarily provide grounds for acquittal. *Hamling v. United States*, 418 US 87 (1974). However, there exists a limited exception to the rule wherein:

> . . .'an acquittal on one charge clearly constitutes a finding that a fact essential to the proof of another charge does not exist.' *United States v. Bosch*, 584 F2d 1113, 1118 (lst Cir. 1978); see *Ashe v. Swenson*, 397 US 436, 443-46 (1970); 8A Moore's Federal Practice Paragraph 29.08[1] at 29-47 to 29-50.

The alleged crime committed by Valenti and for which he was acquitted (Count V) is precisely the same offense and act upon which Petitioner was charged and convicted (Count IV). This inconsistency should be noted by the Court in its assessment of the sufficiency of the evidence at trial and particularly, as the Conspiracy charge of the Indictment (Count I) alleges that Valenti's visit to the home of Filipini comprises the third enumerated overt act allegedly committed furtherance thereof.

Government's exhibit 5C also included four conversations between Petitioner and Filipini. Two of these conversations were initiated

by Filipini. The first conversation again consisted of Petitioner's efforts to get Filipini to agree to meet with him to discuss Filipini's unauthorized use of the American Express card given to him by Petitioner. The next three conversations concerned a visit from the New York State Bureau of Criminal Investigation to Filipini's home in order to investigate Filipini on a charge of conspiracy to sell an automatic weapon. After hearing this news, Petitioner promises Filipini his help in securing a lawyer to defend against the charge. This exhibit does not contain any evidence which tends to show that Petitioner committed any of the acts with which he was charged. There is no effort to dissuade Filipini from giving evidence to Diane Turner and there is no effort to convince Filipini to lie to Diane Turner.

These tapes and Filipini's corroborating testimony provided the majority of the Government's evidence against Petitioner. It is interesting to note that the actual tapes of conversations between Petitioner and Filipini, by any objective view, are devoid of threat, while Filipini's portrayal of his relationship with Petitioner in his testimony is replete with threat. It readily appears that when Petitioner was being taped, without his knowledge, he was a very different person than that portrayed by the Government's witness.

In conclusion, a review of the evidence shows that, whatever the relationship between Filipini and Petitioner, there was no intent on Petitioner's part to hinder, delay or prevent Filipini from giving evidence to a government official nor is there any evidence that he conspired to do so.

The Court of Appeals held that this evidence was sufficient to establish the elements of the crime described in 18 USC Section 12(b)(3). This statute, which is a relatively recent one, was passed in order to prevent the intimidation of witnesses by acts which were innocent outside the context of a criminal investigation. S. Rep. No. 532, 97th Cong., 20 Sess. 17 (1982) reprinted in 1982 US Code Cong. & Ad. News 2515, 2521.

However, Petitioner's case demonstrates that this statute can be applied to innocent acts which remain innocent even when the actor is a target of a criminal investigation. The statute, as applied in Petitoner's case, is unconstitutional as it is unclear what behavior is actually forbidden. *United States v. Spector*, 343 U.S. 169 (1952) (a statute, through plain and unambiguous on its face, may violate

due process when applied); *Boyce Motor Lines v. U.S.*, 342 U.S. 367 (1952) (criminal statute must be sufficiently definite to give warning of what conduct is prohibited). If sufficient evidence existed at the trial level to convict Petitioner of a violation of U.S.C. Section 1512 (b)(3), then it appears that the statute requires a target of a criminal investigation to affirmatively avoid any potential witnesses. This is not clear from a reading of the statute. The granting of this Petition will permit this Court the opportunity to resolve the crucial constitutional question of whether 18 U.S.C. Section 1512(b)(3), as it applied to Petitioner's case, resulted in a denial of Petitioner's right to due process. It is imperative that this Court provide clarification of the type of behavior prohibited by the statute. This is a unique and significant question which this Court should address.

POINT II

THE ENHANCEMENT OF PETITIONER'S SENTENCE FROM THE BASE OFFENSE LEVEL CONSTITUTED AN INCORRECT APPLICATION OF THE GUIDELINES RESULTING IN A THREE-FOLD INCREASE OF PETITIONER'S SENTENCE

Petitioner was sentenced to serve 35 months on May 31, 1989. Sentencing Guideline Section 2J1.2, *Obstruction of Justice,* was deemed to be applicable. The base offense level according to this Guideline was a 12, which carries with it a sentence of 10-16 months. Federal Sentencing Guidelines Manual, (West 1988). The Guideline Section 2J1.2 contains the following enhancement:

> Section 2J1.2 *Obstruction of Justice*
> (a) Base Offense Level: 12
>
> (b) Specific Offense Characteristics
>
> (1) If the defendant obstructed or attempted to obstruct the administration of justice by causing or threatening to cause physical injury to a person or property, increase by 8 levels.

The resulting addition of 8 triples the sentence, making the applicable sentencing range from 33-41 months. Petitioner contended below that this application of the enhancement of this case is incorrect and appealable pursuant to 18 USC 3742(a)(2).

The Government, who desires to incarcerate and obtain an adjustment to the base offense level must bear the burden of coming forward with sufficient proof to establish a *prima facie* case that the adjustment is appropriate. The burden then shifts to the opposing party to rebut this proof. The standard of proof at sentencing is a preponderance of the evidence. This standard also applies to disputes concerning the accuracy of the pre-sentence report. *United States v. Pugliese,* 860 F2d 25 (2d Cir. 1988); *United States v. Lee,* 818 F2d 1052 (2d Cir. 1987); *United States v. Lovell,* 715 F. Supp. 854, 857 (WD Tenn. 1989). The application of the specific offense characteristic was incorrect here because the Government did not establish by sufficient proof that Petitioner

"caused or threatened to cause physical injury to a person" as so required and within the meaning of the Guidelines as explicated by the Commentary to Section 2J1.2(b).

The question of the analysis and proper application of this section of the Sentencing Guidelines was one of first impression in the Court of Appeals for the Second Circuit. The necessity for following the commentary is found at Guideline Section 1B1.7 which states in pertinent part:

> Section 1B1.7 *Significance of Commentary*
>
> The Commentary that accompanies the guideline sections may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied. Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal. See 18 USC Section 3742.

The Commentary is especially important in this situation where the Circuit apparently had no case law to assist it in determining the appropriate application of the specific offense guideline at issue here. The Commentary to Section 2J1.2(b) includes the following language:

> **Background:** This section addresses offenses involving the obstruction of justice generally prosecuted under the above-referenced statutory provisions. Numerous offenses of varying seriousness may constitute obstruction of justice: using threats or force to intimidate or influence a juror or federal officer; obstructing a civil or administrative proceeding; stealing or altering court records; unlawfully intercepting grand jury deliberations; obstructing a criminal investigation; obstructing a state or local investigation of illegal gambling; using intimidation or force to influence testimony, alter evidence, evade legal process, or obstruct the communication of a judge or law enforcement officer; or causing a witness bodily injury or property damage in retaliation for providing testimony, information or evidence in a federal proceeding. The retaliation for providing testimony, information or evidence in a federal proceeding. *The conduct that gives rise to the violation may, therefore, range from a mere*

threat to an act of extreme violence. The specific offense characteristics reflect the more serious forms of obstruction. (Emphasis Added)

In its juxtaposition of the last two sentences, the Commentary makes clear that the specific offense characteristics do not apply to the "mere threat" of violence but to an actual "act of extreme violence." Upon the record of this case, there were no acts of violence, extreme or otherwise, in this case. In fact, as argued above, there was insufficient evidence to prove that Petitioner's acts fell within the scope of Section 1512(b)(3). In fact, Petitioner's conviction reveals the hidden dilemma of Section 1512(b)(3). Legislative history of this section shows that it was intended to cover innocent and seemingly innocuous acts, which in the context of a criminal investigation become threatening. S. Rep. No. 532, 97th Cong., 2d Sess. 17 (1982), *reprinted* in 1982 US Code Cong. & Ad. News 2515, 2521 (discussing Section 1512(a)(2), the precursor of Section 1512(b).) The dilemma arises when, as in this case, despite the existence of a criminal investigation, the innocent acts are truly innocent. These innocent acts are the category of acts for which Petitioner was convicted. Although Section 1512(b)(3) makes these innocent acts criminal, it cannot magically transform them into acts of violence. None of the events alleged to be efforts to dissuade or prevent Filipini from giving evidence were by themselves, criminal. This includes the alleged car chase between Filipini and Petitioner which was the basis of Count II of the Indictment and of the Judge's decision to enhance Petitioner's sentence. It is obvious that nothing criminal occurred during this incident. Despite the fact that a police officer was in the back seat of Filipini's vehicle during the "chase", this event was never the subject of a separate State prosecution. This police officer didn't even issue a ticket after both cars had stopped.

The above argument demonstrates that prosecutions and sentences under this section must be scrutinized with special care. This is especially true in a case like Petitioner's where the contacts between Filipini and Petitioner were ostensibly innocent. However, assuming that Petitioner's conduct was culpable under Section 1512(b)(3), it clearly falls on the "mere threat" side of the spectrum articulated in the Commentary. If the Sentencing Commission had intended that all activity along the spectrum from "mere threat to extreme violence"

be punished at the specific offense level, it would not have provided for a base offense level of 12. As it did provide for this base offense level, it must be assumed that cases on the lower end of the spectrum, such as Petitioner's, fall within the base offense level. Therefore, the application of the specific offense level was incorrect as was the affirmance of the decision in the Court of Appeals for the Second Circuit was incorrect. The sentence should be reversed and remanded for sentencing within the Guidelines Range set at Base Offense Level 12.

POINT III

PETITIONER'S LEGAL REPRESENTATION AT TRIAL WAS INEFFECTIVE AND DEPRIVED PETITIONER OF A FAIR TRIAL

The Supreme Court has said that the purpose of the constitutional requirement of effective assistance of counsel is to ensure that the defendant's right to a fair trial, guaranteed by the Due Process Clause of the Fifth Amendment, and by the Sixth Amendment, is not violated. *Strickland v. Washington,* 466 US 668, 685-86 (1984). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 US at 686. This occurs when counsel's performance falls "below an objective standard of reasonableness. . .under prevailing professional norms" and when such performance creates "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 US at 687, 694. *Cuevas v. Henderson,* 801 F2d 586 (2d Cir. 1986). In order to establish a valid claim of ineffective assistance, it is necessary to "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland,* 466 US at 690. The acts and omissions of trial counsel DeAngelus, which constituted ineffective assistance of counsel, will now be discussed.

Defense counsel's errors at trial began immediately. During the Government's opening, the prosecutor made the following comment:

> At the time of his arrest, (Ralph Valenti) admitted to Agent Turner that he visited Vincent Filippini, and that he made that telephone call.
>
> But what did he attribute it to? According to Ralph Valenti, he attributed this to a dispute between 2 *queers or fags.* According to Ralph Valenti, the whole dispute between Petitioner and Vincent Filippini came down to a lover's quarrel.

These remarks were highly prejudicial and inflammatory and,

incredibly, defense counsel failed to object.[4] To underscore the significance of this slur and defense counsel's failure to respond to it, we ask this Court to imagine that the prosecutor had characterized this event as a "dispute between two niggers or two kikes". As a result of defense counsel's laxity, the prosecutor was permitted to pander to the subconscious or conscious prejudices of the jury, the jury heard these comments without any admonition from the Judge as to their impropriety and Petitioner was depicted as someone to be denigrated and vilified for his alleged failure to conform to societal norms.

Another glaring deficiency in defense counsel's representation focuses upon the problem of the six tapes which the Government offered into evidence. Government Exhibits 4A-4C, 5A-5G, 6A-6D, 7A-7D, 8A-8B, 9A-9D. Three of these tapes were made by Government witness Filipini on his own initiative. Government's exhibit 4A-4C, 5A-5G, 6A-6D. Exhibits 7A-7D were tapes of a meeting between Filipini and Petitioner during which Filipini wore a wire. Exhibit 8A was a tape of a phone conversation between a State Police Officer and an anonymous caller, later identified as John Randio. Exhibit 9A-9D contained a conversation between Edwin Sewell, member of the New York State Department of Corrections, and Petitioner. While defense counsel was provided with transcripts of all the above-listed tapes, he never sought discovery of the tapes themselves to determine their audibility. Further, he never requested, as standard procedure required, a pre-trial determination that the tapes were authentic and accurate. Cipes, *Criminal Defense Techniques,* Vol. V, 1B-71 (Matthew Bender 1989); Carr, *Electronic Surveillance,* Section 7.5(a), 7-66 (2d Ed. Clark Boardman 1989). At trial, defense counsel permitted these tapes, without objection, to be introduced into evidence without holding the Government to the standard set forth by the Circuit in which he practiced:

> On the other hand, since recorded evidence is likely to have a strong impression upon a jury and is susceptible to

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[4]Despite defense counsel's inexplicable failure to object to these remarks, the failure of the District Court to admonish the prosecutor and give a curative instruction to the jury was plain error and was asserted below as separate grounds for reversal. Fed. R. Crim. P. 52(b). *US v. Harris,* 542 F.2d 1283 (7th Cir. 1976); *US v. Cohen,* 177 F2d 523 (2d Cir. 1949), cert. denied 339 US 914 (1950).

> alteration, we have adopted a general standard, namely, that the government 'produce clear and convincing evidence of authenticity and accuracy' as a foundation for the admission of such recordings. *United States v. Knohl,* 379 F2d 427, 440 (2d Cir.), cert. denied, 389 US 973, 88 S.Ct. 472, 19 L.Ed.2d 465 (1967).

United States v. Fuentes, 563 F2d 527, 532 (2d Cir. 1977).

It is unlikely that the Government could have produced clear and convincing evidence of the authenticity of the tapes made by Filipini at his home, on his own initiative. Instead of holding the Government to their standard of proof, defense counsel thus allowed tapes to go into evidence on Filipini's testimony that these tapes were accurate recordings. No evidence was elicited by defense counsel from Filipini on the type of recording device he had used, how he had learned to use this device, or how it was installed. Defense counsel did not conduct voir dire on where the tapes were stored or whether they were edited or adulterated in any way. In fact, defense counsel took the reliability and integrity of these tapes completely for granted, conduct which falls far below professional standards. Because these tapes were a substantial part of the Government's proof, the failure to create obstacles to their admission and to at least raise a doubt in the jury's mind as to their reliability seriously prejudiced Petitioner's chances for acquittal and is further evidence of defense counsel's ineffective assistance.

The assistance which defense counsel gave to the Government in this case can be seen in his handling of the testimony of Vincent Filipini. Fourteen transcript pages of Filipini's direct testimony deal solely with business transactions made by Petitioner. This evidence was not relevant to the charges in the Indictment. Evidence of these transactions did not tend to prove that Petitioner had a motive for intimidating Filipini because these dealings were not alleged to be illegal, as the prosecutor stated in his opening. This evidence was offered solely for the improper purpose of prejudicing the jury against Petitioner; and should have been objected to as irrelevant, prejudicial, and improper pursuant to Fed. R. Evid. 404(b).

Defense counsel not only failed to make these very standard objections, he exacerbated the situation by eliciting more testimony about these transactions during Filipini's cross-examination. In

fact, the following exchanges took place during defense counsel's cross of Filipini.

> Q. Okay. Now, tell this jury what the big deal is about Mr. Romeo that he didn't want you to talk to Diane Turner about? Go ahead, I want to sit down again.
>
> A. Well, for starters, all his cash loans that he had to people. Not paying any tax on the pizzeria, just basically his overall loan sharking.
>
> MR. DE ANGELUS: Your Honor, I'm going to move to strike that as a conclusion.
>
> THE COURT: You asked the question, Mr. DeAngelus.

Oblivious to the damage this line of questioning had caused his client, defense counsel repeated the question several minutes later:

> Q. Tell this jury, Mr. Filippini, what information that you had that you wanted to communicate to Diane Turner concerning Frank Romeo that he allegedly prevented you from turning over to him?
>
> THE WITNESS: What Mr. Romeo said was the fact that the cash dealings in the pizza place, that Ann and Joey were already arrested for transporting money or something and they were under investigation for not filing any returns, and he also said he was afraid that they will get into the car lot and dig into the files. Find out about his loan sharking and the checkbooks and other goings on in his business.

These exchanges demonstrate that defense counsel was not giving Petitioner effective assistance as measured by reasonably objective standards. In fact, these exchanges show defense counsel giving effective assistance to the prosecution in depicting Petitioner as a "loanshark".

This depiction of the Defendant as a loanshark originated in Filipini's direct testimony, unobjected to by defense counsel, and elaborated upon by Filipini in defense counsel's cross-examination, was highly prejudicial to Petitioner's case. The term "loanshark" includes as part of its definition the use of "threat or employment of extortionate means to enforce repayment. . ." Black's Law Dictionary (5th Ed. West Pub. 1979). An extortionate means is any

means which includes the use of violence. 18 USC Section 891(6)(7). Therefore, this evidence of Petitioner's loansharking activities was truly evidence of Petitioner's violent character and operated on the jury's mind to prove that his alleged intimidation of Filipini was in conformity therewith. This is precisely the type of evidence excluded by Fed. R. Evid. 404(b)[5]. *United States v. Williams,* 596 F2d 44, 50 (2d Cir. 1979), cert. denied 442 US 946 (1980).

Defense counsel also acted below the standard of reasonableness in his cross-examination of Government witness Norma Filipini, mother of Vincent Filipini. Mrs. Filipini testified on direct that Petitioner had charged her son in the City Court of Rensselaer for unauthorized use of a credit card and that the charges were dismissed because of Petitioner's failure to appear at the Court date. During defense counsel's re-cross-examination of Mrs. Filipini, the following exchange took place:

> Q. Isn't it a fact that your son was sued by Mr. Romeo in the small claims court sometime in November 1988?
>
> A. Isn't that what we were just referring to?
>
> Q. Yes.
>
> A. Yes.
>
> Q. And isn't it a fact that Mr. Romeo was arrested in this matter on October — November 10th, 1988?
>
> A. Correct.

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[5]Petitioner also asserts that the admission of evidence relating to Romeo's business transactions and described by Filipini as loansharking was improper under Fed. R. Evid. 404(b) for the reasons stated in the text accompanying this footnote, and though unobjected to, its admission into evidence should have been disallowed by the Trial Judge and constitutes plain error under Fed. R. Crim. P. 52(b). *United States v. Desist,* 384 F2d 889 (2d Cir. 1967), *aff'd* 394 US 244 (1969). Because this error substantially affected Romeo's rights, the improper admission of this evidence was asserted below as a separate ground for reversal of Romeo's conviction. *Bihn v. US,* 328 US 633 (1946); *Kotteakos v. United States,* 328 US 750 (1946); *United States v. Antonelli Fireworks Co.,* 155 F2d 631 (2d Cir. 1946).

Q. And isn't it a fact that part of his bail release were, was that he could not in any way have any contact with your son Vincent Filippini during the course of this proceeding?

MR. SILVER: Objection, Your Honor.

THE COURT: Sustained. Unless she knows that of her own knowledge. If you know.

THE WITNESS: No sir, I don't know that.

BY MR. DE ANGELUS:

Q. And isn't that the fact why Mr. Romeo could not go to Rensselaer City Court on the day of the return date because he could not be in the vicinity of your son under the terms of his bail?

MR. SILVER: Objection, your Honor.

THE COURT: Sustained.

THE WITNESS: Does that mean I can answer?

THE COURT: No, it means you cannot answer.

BY MR. DE ANGELUS:

Q. You don't know anything about that?

THE COURT: I sustained the objection, Mr. De Angelus. Do you have anything else?

Defense counsel's strategy, or lack thereof, is mystifying. Apparently unsatisfied with the prejudicial inferences which he had raised in the jury's mind during this exchange, defense counsel insisted on reading the conditions of Petitioner's pre-trial release to the jury:

MR. DE ANGELUS: Paragraph 7 of the conditions of release indicate, 'The defendant shall abide by the following restrictions on his personal association, place

> of abode or travel: Defendant either personally or through any other person is not to attempt to communicate in any manner with Vincent Filippini, Beth Harrington or any member of the family of either, except that his attorney may communicate with those individuals in any manner necessary to in good faith prepare a defense of this action.'

Unsurprisingly, this offer of evidence was not objected to by the Government. The reading of these conditions of release to the jury, emphasizing the specific admonitions by a Magistrate to keep away from Filipini, illustrates the depths to which defense counsel's representation sank. Surely, if the Government had sought to introduce this evidence, it would have been excluded as irrelevant and grossly prejudicial. *Figueroa,* 618 F2d at 943. In this instance, defense counsel out-prosecutes the prosecutor.

The last of defense counsel's errors, as egregious as the others, was his failure to object to testimony of Vincent Filipini concerning a conversation he had had with Valenti at the Filipini residence and the tape of the phone conversation with Valenti. The statements made by Valenti were inadmissible as hearsay against Petitioner, absent a determination by the District Court, outside of the hearing of the jury, that the Government had "demonstrate(d) that the declarant and the defendants against whom the statements (were) offered (were) members of a conspiracy in furtherance of which the statements (were) made." *United States v. Stratton,* 779 F2d 820 (2d Cir. 1985). The appropriate procedure for this determination in this Second Circuit was laid out several years ago in *United States v. Geaney,* 417 F2d 1116, 1119 (2d Cir. 1969), *cert. denied* 397 US 1028 (1970). This procedure calls for a motion by the prosecutor, out of the hearing of the jury, for a Geaney ruling that the requisite demonstration has been made. 417 US at 1119. In this case, the prosecutor never made a motion for such a ruling, possibly because there was no evidence showing a concert of action, but certainly because defense counsel's failure to object to the admission of Valenti's statements against Petitioner eliminated the necessity for this ruling as far as the Government was concerned. If the jury had been instructed not to consider the statements made by Valenti as evidence against Petitioner, there would have been no probative evidence against Petitioner on the conspiracy charge of the

Indictment. Acquittal on that count at least would have been mandated.

The claim of ineffective assistance of counsel is not easy to make and counsel is not unmindful of the wealth of jurisprudence which renders such argument difficult to prevail upon. In this case, however, the many acts of omission and error which are enumerated above prove that defense counsel's representation of Petitioner fell far below an objective standard of reasonableness. Further, the evidence which was erroneously admitted against Petitioner as a result of defense counsel's ineffective assistance cannot be said to have been harmless in a case where the evidence was hardly overwhelming. On the contrary, this is a case which squarely meets both prongs of the two-part test articulated in *Strickland v. Washington,* 465 US 668, 685-86 (1984). Because Petitioner's representation was ineffective, he was substantially deprived of a fair trial and the conviction should be have been reversed.

Inexplicably, the Court of Appeals for the Second Circuit failed to address this issue in its decision. A1-A3. Therefore, it remains for this Court, in granting the Petition to determine whether and to what extent Petitioner's lack of representation at trial denied him of his Fifth and Sixth Amendment rights.

POINT IV

THE FAILURE OF THE TRIAL COURT TO RULE ON DEFENSE COUNSEL'S OBJECTION TO A WITNESS' REFERENCE TO THE "MAFIA" WAS CLEARLY ERRONEOUS AND WARRANTS REVERSAL OF PETITIONER'S CONVICTION

During the direct testimony of Norma Filipini, the following discussion took place:

> THE WITNESS: I told Frank Romeo that I was sick of what had been going on. My life is being overrun with BCI people, with IRS agents, a visitor, I believe I said mafia, member of the brotherhood that was at my gate the previous Friday — Saturday.
>
> MR. DE ANGELUS: Objection, Your Honor. I don't see the relevancy, I think that the connotation mafia is terribly prejudicial at this point not knowing at what point of time during the course of this discussion this took place, if it did take place during this discussion.
>
> THE COURT: I understand. Mr. Silver, do you take a position, sir?
>
> MR. SILVER: Your Honor, yes, I believe everything that this witness said to Mr. Romeo during this conversation is relevant to show his state of mind, what he responded to and what he said in response to these statements by the witness.
>
> THE COURT: What did Mr. Romeo say in response to this, Mrs. Filippini?

The Judge never ruled on counsel's objection. Subsequent to this, there were three more references made to the mafia by co-counsel for Valenti on his cross-examination of Mrs. Filipini. No objections were posed to these references, possibly because the trial judge's earlier silence had convinced Petitioner's trial counsel that it was not a problem worth pursuing.

The admission of these references to the mafia without a curative instruction created substantial prejudice in the minds of the jury.

The danger of this prejudice was particularly clear in this case with its vague, but highly prejudicial, references of "loansharking", activity which is guaranteed to establish a connection to organized crime in the jury's mind.

The trial Judge has broad discretion in its task of weighing the probative value of relevant evidence against its prejudicial character. A reversal on this ground requires an abuse of discretion by the trial Judge. *United States v. Cheung Kin Ping*, 555 F2d 1069 (2d Cir. 1977); *United States v. Robinson*, 544 F2d 611 (2d Cir. 1976), aff'd on rehearing, 560 F2d 507 (1977), *cert. denied* 435 US 905 (1978). However, the Trial Judge has a duty to weigh the probative value of the evidence against its prejudicial effect. *Robinson*, 560 F2d at 514. It is clear from the record that the judge failed to perform the necessary balancing test. The careful consideration which this balancing test required, which would have revealed the impropriety of these comments, was somehow omitted in the heat of the trial. These references to the "mafia", combined with the testimony later in the case concerning Petitioner's "loansharking" are clearly prejudicial in that they depict Petitioner as a violent gangster for whom witness intimidation would be an everyday matter. The admission of this testimony seriously jeopardized Petitioner's chances for acquittal. Despite this omission by the Trial Court and the failure of the Court of Appeals for the Second Circuit to address the issue, this Court must rule that these comments were prejudicial and warrant reversal of Petitioner's conviction.

POINT V

THE DISTRICT COURT'S FAILURE TO GRANT PETITIONER'S MOTION FOR A NEW TRIAL OR TO CONDUCT A HEARING WHEN A JUROR VOLUNTARILY CAME FORWARD AFTER THE VERDICT AND ADMITTED THAT HE HAD BEEN COERCED BY ANOTHER JUROR INTO VOTING GUILTY DURING DELIBERATIONS WAS CLEARLY ERRONEOUS

This case presents yet another instance of a juror coming forward after trial and verdict and expressing possible grounds of improper coercion. These circumstances arise out of a juror's post-verdict misgivings as expressed in an off-the-record in-chambers discussion with the trial Judge some four days after the verdict of guilty.

The facts surrounding this issue are relatively without dispute. On or about April 5, 1989, Petitioner's counsel[6] received a telephone call from the trial Judge who advised him of a certain in-chambers discussion with one of the trial jurors. This discussion occurred immediately after counsel's submission of post-trial motions seeking to set aside the verdict and for a new trial. The trial Judge related that, approximately five days after the jury verdict, on March 28, 1989, he received a visit at his chambers, from Juror No. 3, who advised him that he was having second thoughts regarding his verdict, particularly his vote to convict Defendant Valenti. He told the Judge he did not believe that Defendant Valenti was guilty. He further told the Judge that his verdict had been coerced because he had been intimidated and compelled to vote guilty on account of the threatening and belligerent behavior of Juror No. 7, who, during a particularly heated moment in the deliberation, had started to advance toward him but had been stopped by the other jurors. The trial Judge's account of this conversation on the record of argument of the post-trial motions concluded that while the juror did not, at the time, think there was danger to himself, in retrospect, he believed there might have been. There was neither discussion nor apparent inquiry concerning what might have induced or influenced the behavior of Juror No. 7.

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[6]After his conviction, Petitioner retained new counsel to handle his case through the sentencing and Appellate stages.

Upon receipt of this information from the trial Judge, counsel was granted permission and filed with the Court a supplemental motion for a new trial upon grounds that, in effect, the jury verdict was coerced and improper, and that Petitioner had been deprived of a fair trial and in the alternative, requested that the Court conduct an evidentiary hearing into the totality of the circumstances surrounding this issue. The thrust of counsel's Affidavit, submitted in support of the supplemental motion, was that pursuant to Rule 606(b) of the Federal Rules of Evidence, the Court should conduct a hearing or inquiry to determine ". . .whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was brought to bear upon any juror." (Affidavit of Petitioner's Counsel, Michael A. Feit, dated April 6, 1989.) The District Court summarily denied Petitioner's application without hearing.

Petitioner's claim is that those events described by the trial Judge resulted in the coercion of at least one juror into a verdict and thereby deprived Petitioner of a fair trial. Upon the unusual set of circumstances at bar, and particularly, the in-chambers discussion between the Juror and the trial Judge, to which no counsel were privy, Petitioner was entitled to an evidentiary hearing on this issue. Petitioner's counsel pressed for this hearing at argument of the post-trial motions and asserted that any post-verdict inquiry, under the circumstances, necessarily involved judicial sanction and was the only appropriate manner in which the facts underlying the respective jurors' conduct might be discovered. It is obvious that practical and ethical considerations prevented counsel from proceeding outside of the formal courtroom and privately investigating the jurors after Juror No. 3 had come forward and spoken to the trial Judge.

Concededly, and as the Court of Appeals for the Second Circuit has previously held, it would be inappropriate for counsel at this juncture to press for a new trial as it is not at all clear what occurred. *United States v. Gersh,* 328 F2d 460, 464 (2d Cir.), cert. denied sub nom., *Mugnola v. United States,* 377 US 992 (1964). Petitioner has been compelled to rely upon the trial Judge's description of his conversation with the Juror which was not sworn or transcribed. This conversation was clearly not intended to be a detailed inquiry or consideration of the evidentiary facts, and was limited to a rather simple explanation by the Juror of his feelings

and apparent misgivings concerning his vote for conviction.

In *United States v. Ianiello,* 866 F2d 540 (2d Cir. 1989), the Second Circuit addressed these very same issues and noted that post-verdict evidentiary hearings raise serious questions and that the gravity of such procedure should not be underestimated.

Petitioner has been denied a fair opportunity to make any showing other than to argue those possible implications stemming from the in-chambers discussion between the Juror and the trial Judge. The Court of Appeals for the Second Circuit noted in *Ianiello, supra,* at 543, that:

> The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality. c.f. *United States v. Barshov,* 733 F2d 842, 851 (11th Cir. 1984), cert. denied, 469 US 1158, 105 S.Ct. 904, 83 L.Ed.2d 919 (1985), citing *United States v. Winkle,* 587 F2d 705, 714 (5th Cir.) cert. denied, 444 US 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979).

Counsel readily acknowledges the consistent reluctance to allow a defendant opportunity to investigate jurors and thus conduct a "fishing expedition" in the process. *United States v. Moten,* 582 F2d 654, 657 (2d Cir. 1978). But under the facts at bar, counsel had no alternative. Counsel decided to make immediate application to the District Court in seeking an inquiry upon these issues, mindful of the fact that Juror No. 3 had already had a discussion with the trial Judge. Counsel chose this course mindful of professional responsibilities to avoid the implication of jury tampering and thus creating the uncertainty with respect to the jury verdict which the Court has consistently sought to avoid. *Miller v. United States,* 403 F2d 77, 82 (2d Cir. 1968); *United States v. Crosby,* 294 F2d 928, 950 (2d Cir. 1961), cert. denied sub nom., *Mittelman v. United States,* 368 US 984, 82 S.Ct. 599, 7 L.Ed.2d 523 (1962).

It is impossible at this juncture to argue to the Court what factors or influences motivated Juror No. 7 to act in the manner that was described to the trial Judge. The hostility and belligerence of Juror No. 7, which apparently served to intimidate Juror No. 3, was manifest in light of No. 3's hesitancy in response to the verdict poll and his decision to speak with a priest and make direct contact with the Court. The description of Juror No. 7's conduct necessitates a

judicial inquiry into whether this Juror's conduct was motivated by some extraneous or outside influence or other such impermissible factor. Additionally, if Juror No. 3's verdict had been tainted by the actions of Juror No. 7, it might well be that other jurors had been so affected.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . ." The Supreme Court in *Remmer v. United States,* 347 US 227, 229 (1954) noted to this effect:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Here, the Trial Court has unilaterally made its own subjective determination of these circumstances based upon its *in camera* discussion with Juror. The District Court denied Petitioner's motion for a new trial without opinion, and counsel is thus compelled to speculate upon what basis the trial Judge felt Petitioner's argument or showing was inadequate. Concededly, the burden was on Petitioner to come forward with proof that Juror No. 7's actions were tainted. However, in these circumstances, this was an impossible burden. The interest of Petitioner here was in learning the whole story of what occurred. But these facts remain unclear under these rather vague circumstances.

In *United States v. Moten,* 582 F2d 654 (2d Cir. 1978), the Court of Appeals of the Second Circuit noted that an application for permission to conduct a post-trial interview of jurors requires the balancing of conflicting interests. The Petitioner's right to trial by an impartial jury is, of course, balanced by the requirements of the proper functioning of the jury system and the need to protect jurors from post-trial harassment by the defeated party.

Rule 606(b) of the Federal Rules of Evidence provides for inquiry into the validity of a verdict and the taking of testimony from a

juror under several different circumstances including: ". . . whether extraneous prejudicial information was improperly brought to the jury's attention or whether outside influence was improperly brought to bear upon any juror." While the Rule (606(b)) contemplates reconciliation of conflicting interests, albeit weighted on the side of juror protection, the Court in *Moten, supra,* at 665, specifically noted that the rule admits testimony concerning "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Citing *Mattox v. United States,* 146 US 140, 148-49 (1892).

Petitioner, in his application for a post-trial investigation, relied upon the well-established authority cited in *Moten, supra,* at 655, that in order to ensure protection of the jury, a trial Judge has the power and duty to order that all post-trial investigation of jurors shall be under his supervision. Counsel studiously sought to avoid any conduct which might impinge upon or harass the jury in any manner and thus influence inquiry of the facts in this case. *Miller v. United States,* 403 F2d 77, 81-82 (2d Cir. 1968). The District Court, however, in construing its authority in a manner seemingly designed to protect the inviolability of the jury, has, in the process, denied the basic Sixth Amendment rights of the Petitioner. The Court's refusal to conduct a hearing precluded any and all inquiry into the truth. The instant case is a most unusual one in that the information concerning possible juror misconduct was communicated directly to the trial Judge and counsel was thus compelled to rely upon information provided by the ultimate arbiter of this issue. Under these circumstances, Petitioner's request for permission to conduct some form of inquiry was improvidently denied.

This Petition should be granted so that this Court can determine whether to remand for limited proceedings which would include *in camera* examination in order that the facts and circumstances surrounding the conduct of Jurors No. 3 and 7, and what effect, if any, these circumstances had on the other jurors can be determined. In this manner, the trial Court may exercise its supervision with proper definition and at the same time, permit all relevant issues to be explored.[7]

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[7]As discussed above, the issue of Valenti's conviction on the conspiracy count of the Indictment is critical to Romeo; if Valenti's conviction is reversed, Romeo's conviction on that count falls with it. See *supra,* FN 4 and accompanying text.

Concerning this issue, the Court of Appeals stated that there was no showing that the alleged jury room altercation between two of trial Judge denied him this. In *Rushen v. Spain,* 464 US 118 (1983), this Court said:

> This is not to say that ex parte communications between judge and juror are never of serious concern or that a federal court on habeas may never overturn conviction of prejudice resulting from such communications. When an ex parte communication relates to some aspect of the trial, the trial Judge generally should disclose the communication to counsel for all parties. The prejudicial effect of a failure to do so, however, can normally be determined by a post-trial hearing.

464 U.S. at 119.

The situation in *Rushen* is analagous to the situation here. The contact between the juror and the judge, as well as the altercation between the jurors, seriously implicates the Petitioner's Fifth and Sixth Amendment Rights. The issue of whether and how to address these Due Process and Fair Trial problems is an important one that must be examined by this Court.

CONCLUSION

For the reasons provided in the foregoing reasons, Petitioner Frank A. Romeo asks that this Court grant his Petition for Writ of Certiorari in all respects.

DATED: June 14, 1990

Respectfully submitted,

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On the Petition:
Ellen C. Brotman, Esq.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

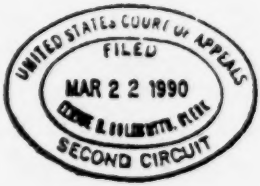
At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of March, one thousand nine hundred and ninety.

PRESENT: HONORABLE WILLIAM H. TIMBERS,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

FRANK A. ROMEO and RALPH VALENTI,
Defendants-Appellants.



89-1278
89-1279

ORDER

Frank A. Romeo and Ralph Valenti appeal from the June 7, 1989, judgments of the District Court for the Northern District of New York (Con. G. Cholakis, Judge), after being tried by a jury on a five count indictment. Romeo was convicted of threatening a government informant, Vincent Filippini, in violation of 18 U.S.C. § 1512 (b) (3) (1988), causing defendant Valenti to threaten Filippini (18 U.S.C. § 2(b) (1988)), and conspiring with Valenti to threaten Filippini so as to hinder the latter from cooperating in the Internal Revenue Service's investigation of Romeo (18 U.S.C. § 371 (1988)). Valenti was convicted solely on the conspiracy count. On appeal, Romeo and Valenti challenge the sufficiency of the evidence against them and a number of aspects of procedure at their trial. Romeo also challenges his sentence.

Appellants acknowledge that "[a] defendant challenging the sufficiency of the evidence on appeal bears a heavy burden." *United States v. Rastelli,* 870 F.2d 822, 827 (2d Cir.), *cert. denied,* 110 S. Ct. 515 (1989). Romeo, nevertheless, contends that the evidence at most proved him guilty of "tampering" with a potential government witness, but not of using "intimidation or physical force or threat[s]." 18 U.S.C. § 1512(b) (3). Valenti contends that the Government failed to show that he was aware of Filippini's cooperation in the I.R.S. investigation. We disagree with both contentions. From the tape recordings admitted into evidence and the testimony of several witnesses, including Detective Peplowski, the jury could properly infer that Romeo's statements and acts were intended to convince Filippini that he would suffer personal harm — even physical harm — if he continued to cooperate with the I.R.S. Moreover, the trial testimony concerning Valenti's appearance at Filippini's house and the tape recording of a subsequent telephone conversation between the two allowed the jury to conclude that Valenti not only intimidated Filippini into contacting Romeo, but that Valenti knew that Romeo was attempting to dissuade Filippini from cooperating with the Government.

Appellants' other arguments are also without merit. It is well settled that inconsistencies in the verdict are not a basis for vacating convictions. See *United States v. Powell,* 469 U.S. 57 (1984); *United States v. Alvarado,* 882 F.2d 645, 654 (2d Cir. 1989). We find no error in the admission of the tape recordings and transcripts, where defendants neither challenged their authenticity or accuracy at trial nor present a basis for doubting their accuracy now. See *United States v. Bryant,* 480 F.2d 785, 789-91 (2d Cir. 1973). With regard to the Sewell tapes, the District Court specifically found no misconduct on the part of the Government and, as we have confirmed, that the erased portion had little if any bearing on the import of the recorded conversations. The District Court properly denied appellants' motion for a further examination of certain jurors. " 'The duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality.' " *United States v. Ianniello,* 866 F.2d 540, 543 (2d Cir. 1989), *quoting United States v. Barshov,* 733 F. 2d 842, 851 (11th Cir. 1984), *cert. denied,* 469 U.S. 1158 (1985). Here there was no showing that the alleged jury room altercation between two of the jurors was prompted by extrinsic influence.

Romeo also challenges the enhancement of his sentence under U.S.S.G. § 2J1.2, maintaining that enhancement can only be based on "act[s] of extreme violence." U.S.S.G. § 2J1.2, comment. (backg'd). Even if that were true, the jury returned a guilty verdict on count II of the indictment, which charged Romeo with "willfully driv[ing] his automobile in a threatening manner so as to endanger Vincent Filippini." The District Court quite properly relied upon this jury verdict in applying the guideline.

We have examined appellants' other contentions and find that they are without merit. The judgments of the District Court are affirmed.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Circuit Judges.